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CURRENT TOPICS.

THE Illinois statute authorizing parties to appear before justices of the peace and conduct suits by their agents, does not transform such agents into attorneys at law, so as to make privileged, communications made between a suitor and such an agent. This was decided by the Appellate Court of Illinois for the Second District, in the recent case of *McLaughlin* v. *Gilmore*. In Sample v. Frost, 10 Iowa, 266, it was held that communications relating to the subject-matter of a suit made by one of the parties thereto to a person supposed to be an attorney at law, with a view to engage him professionally in said suit, when such person was not an attorney at law, but was receiving business as one, and was expecting to be, and was admitted to practice at the next term of court, were privileged. The court quoted with approbation the case of Fountain v. Young, 6 Esp. 113, that "the person consulted must be of the profession of the law, and it is not enough that the party making the communication thinks he is." In Holman v. Kimball. 22 Vt. 555, the defendant below offered in evidence the deposition of one Thomas Abbot, to prove admissions and communications relating to the suit made by the plaintiff to Abbot, while he was acting as the attorney and counsel for the plaintiff. It appeared that Abbot had an office and did business as a lawyer in Barton, where the plaintiff resided, and he was employed by the plaintiff to bring suit. Abbot's name was endorsed upon the writ as the attorney for the plaintiff, and upon the court docket in the supreme court upon appeal. Abbot had previously been a student in a law office and was pursuing his studies, but had an office and did business upon his own account. He had not been admitted to the bar as an attorney at the time above referred to, but was subsequently admitted. The court below excluded the depositions and the defendant excepted. The supreme court for this error reversed the judgment, holding that Abbot not being a member of the profession was not within the rule. So, in Wisconsin the rule is declared to be the same. Brayton v. Chase, 3 Wis. 456. The case of Bean v. Quimby, 5 N. H. 94, militates against the rule announced by the above authorities, but upon an examination of the case it will be seen that the court hold contrary to the common law rule, because of a statute of that state which in terms authorizes anyone to commence and manage any cause in any court when employed so to do by another.

In *Cannon v. Villars*, 26 W. R. 751, decided last month in the English High Court of Justice, one V, the owner of a house with a paved gateway under it and a yard behind, agreed to lease to C, a gas engineer, some ground behind the yard, with power to erect thereon workshops for his business, and it was provided that C should not obstruct the gateway, except for the purposes of ingress and egress. On the workshop being erected, the only access thereto for carts was through the gateway. It was necessary for C's business that carts and vans should have access to his workshop, and he complained that V blocked up the passage with certain empty vans of his own. V had been in the habit of doing this before the agreement had been made. C thereupon brought an action for the removal of the obstruction and for an injunction. The court held, that under the agreement, C had a right of access for vehicles to his premises and not a restricted right of footway only, and that he was entitled to an injunction. "As I understand it," said JESSEL, M. R., "the grant of a right of way *per se*, and nothing else, may be a right of footway, or it may be a general right of way, that is, a right of way, not only for people on foot, but for people on horseback, people in carts, carriages and other vehicles. Which it is is a question of construction of the grant, and that construction will, of course, depend on the circumstances surrounding the execution of the instrument, so to say. Now, one of those circumstances is the nature of the *locus in quo* over which the right of way is granted. If we find a right of way granted over a metalled road, with pavement on both sides, existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed, which is obviously the pass-

age, not only of foot-passengers, but of horsemen and carts. Again, if the right of way were granted along a piece of land capable of being used for the passage of carriages, and the grant was of a right of way to a place which is stated on the face of the grant to be intended to be used, or to be then actually used, for the purpose which would necessarily or reasonably require the passage of carriages, it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the house was designed to be used or was actually used. If, on the other hand, we find that the road in question, over which the grant was made, was paved only with flag-stones, and that it was only four or five feet wide, over which a wagon, or cart, or carriage ordinarily constructed could not get, and that it was only a way used for a field or close, or something on which no erection was, there, I take it, you would say the physical circumstances showed that the right of way was a right for foot passengers only; it might include a horse under some circumstances, but could not be intended for carts or carriages. Of course, where you find restrictive words in the grant—that is to say, where it is only for the use of foot passengers —stated in express terms, or for foot passengers and horsemen and so forth, there is nothing to argue. *Prima facie* the grant of right of way is to be construed as having regard to the nature of the road over which it is granted, and the purpose for which it is intended to be used, and both those circumstances may be legitimately called in aid in determining whether it is a general right of way, or a right of way restricted to foot passengers, or restricted to foot passengers and horsemen or cattle, or a general right of way for carts, horses, carriages, and everything else."

THE case of *Pool v. Higginson*, decided by the New York Court of Common Pleas last week, is a somewhat novel one. The plaintiff and defendant occupied apartments in a class of building known as French Flats, those of defendant being immediately over plaintiff's. The child of defendant being sick and fretful at night, the defendant was accustomed, whenever it could not be soothed to sleep in any other way, to draw it about in a small carriage which was made to run over the carpet, having two small wheels and a movable castor. The noise caused by the running of this vehicle over the carpet annoyed the plaintiff and his wife, who lived below, and he applied for an injunction to restrain the use of the baby carriage as being a nuisance. No more noise was made in running the carriage than was necessary. The court refused the injunction. "If," said the court, "the rocking of a cradle, the wheeling of a carriage, the whirling of a sewing-machine, or the discord of ill-played music, disturb the inmates of an apartment-house, no relief by injunction can be obtained, unless the proof be clear that the noise is unreasonable, and made without due regard to the rights and comforts of other occupants. The situation of dwellers in apartments, whilst it has its advantages, must be in some respects less agreeable than that of those who occupy a whole house. They can not expect the same quiet and repose. The man who lives in a hotel must not be surprised, if roused from sleep by the heavy foot of some guest passing by his door at an unseasonable hour. Nor ought the plaintiff to have been surprised by the use of any ordinary means which the defendant might employ to lull his sick child to sleep. No man has a right to such immunity from noise that a neighbor can not stir in his own room. There is nothing in the affidavits to lead me to the conclusion that defendant, in having this carriage instead of a cradle, made use of his apartments which, in view of the plaintiff's right to quiet and repose, was unreasonable. It is probable that a cradle, swinging upon pivots in stationary standards, would have answered the purpose as well as the carriage; and as it would make no noise, good neighborship might suggest the use of it. As matter of law, however, if the defendant himself was taken sick, and obliged to walk the floor all night through pain, the plaintiff would have no right to insist that he should put on india rubbers. As has been said, each case must stand by itself, and where people indulge their inclination to be gregarious, they must not expect the quietude that belongs to solitude." The rule in cases of nuisance by noise seems to be that to be enjoined by a court the objectionable sounds must not only be unpleasant, but unreasonable. Regard must be had to the locality and the nature of the use of the property which makes the noise, as well as

the effect produced. Ball v. Ray, 8 L. R. Ch. App. 467, is in point. There a gentleman who leased a basement of a house was enjoined from keeping his three horses therein, because they disturbed the owner and occupants of a private hotel adjoining. "I entirely agree," said Mellish. L. J., "with what has been said by the Lord chancellor, that when in a street like Green street, the ground floor of a neighboring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a piano forte from a neighbors' house, or the noise of a neighbors' children in their nursery, which are noises we must necessarily expect and to a certain degree put up with." In a Scotch case, Robertson v. Campbell, 13 F. C. 61, the printing press of the defendants when in use produced a vibratory sound which shook the plaintiff's building to the annoyance of his family. The court held it a nuisance. So, also, in Johnson v. Constable, 3 D. 1263. In Harrison v. Good, 11 L. R. (Eq.) 338, the noise of children attending an adjoining school was held not to constitute a nuisance. But in Inchbald v. Barrington, 4 L. R. Ch. App. 388, the playing of a brass band, and in Walker v. Brewster, 5 L. R. (Eq.) 25, the discharge of fireworks, were both held to be nuisances. Perhaps the latest decision on the subject of nuisance by noise is that of Harrison v. St. Mark's Church, 4 Cent. L. J. 329, decided by the Common Pleas Court of Philadelphia and affirmed on appeal to the supreme court, where an injunction was granted restraining the ringing of a chime of bells, to the disturbance of the neighboring residents. This case resembles the English case of Soltau v. DeHeld, 9 Eng. L. & Eq. 104. For a further discussion of the subject, see Wood on Nuisances. §§ 542-574.

FORCED SALES UNDER MORTGAGES ON HOMESTEADS.

Can homesteads be mortgaged, and is it necessary for the wife to join in the mortgage? This question has excited much interest in some sections of the country. In the *Southern Law Review*, Vol. IV., N. S. No. 1, a very learned and instructive article on the Effect of Exemption Laws on Fraudulent Conveyances, presents the subject, as far as it goes, in a clear and forcible light, under the law of frauds. There are other points connected with homestead exemption which have come under the judicial investigation of the writer, which may not be uninteresting to the bench and bar.

In many of the states a certain amount of property, real and personal, is exempt from "forced sale." The meaning of the term "forced sale" has received judicial explanation. The Supreme Court of the State of California has decided that "a forced sale is not synonymous with a sale on execution. The latter may be, and often is voluntary in every respect. * * * Its quality, as being voluntary or forced, depends not on the mode of its execution, but upon the presence or absence of the owner." Peterson v. Hornblower, 33 Cal. 266. The court, in this case, held in relation to the homestead which had been mortgaged: "The homestead was not forced upon him, but he was at liberty to avail himself of its protection or not, at his election; the consent of his wife, if he was a married man, being required in order to secure to her also the protection of the homestead exemption." This was under the requisites of the Constitution of California. It has been held in Texas that any sale is a *forced* sale. The courts of that state hold that the exemption laws are designed to protect the man and his family in the enjoyment of such property as is legally exempt, and that the mortgagee can not have the aid of a court to enforce his contract.

It was held in the New York Court of Appeals, by Mr. Justice Denio, that a stipulation in a promissory note "waiving and relinquishing all right of exemption of any property I may have from execution on this debt," is void as against the policy of the law exempting property from sale on execution which was designed for the protection of poor men and their families.

On principles of equity, the case of Pratt v. Barr, 5 Biss., is clearly right. The debtor purchased goods on credit and then sold his entire stock, receiving in part payment the premises which he claimed as a homestead. The creditors filed a bill to have the property sold to satisfy their debts. The court said: "The mere statement of the facts decides the case in the conscience of every honest man, that neither in law nor justice the exemption should be allowed. The defendants can not expect the courts to assist them in consummating the intended fraud. A party can not

turn that which is granted him for the comfort of himself and family into an investment of fraud." The majority of the decisions, state and federal, sustain the principle laid down in Pratt v. Barr, cited *supra*.

We find in a very well written opinion by Randall, C. J.—Petterson v. Taylor, 15 Florida: "An exemption of property from sale by process of law is a personal privilege which may be waived by the owner of the property conveying an interest by means of an absolute or defeasable conveyance of property otherwise exempt from such sale." This was a mortgage of personal property, and it was decided that it was not competent for the mortgagor to claim that the property was exempt from sale under a decree of the court foreclosing the mortgage, the mortgagor claiming that it was exempt under the constitution from forced sale. The court very wisely said: "We do not believe it was the intention of the constitution to deprive the citizens of the common rights and privileges pertaining to property and credit, so far as to render their condition abject and hopeless in their poverty, beyond its express provisions, and the evident intention must control our construction of its language without doing violence to it. * * * And where a borrower obtains a loan of money by a pledge and consent, legally given, that certain specified property which was pledged as security, and without which the loan would not have been obtained, will be sold to pay the debt, the law providing the remedy is before the debtor when the pledge is given, and enters into the contract, and can not be changed so as to affect the contract. Both parties have assented to it, and the action of the court is but carrying out specifically what has been consented to; so that a decree of the court, instead of affecting a *forced* sale, merely compels the parties to abide by their specific agreement, and the sale is decreed in pursuance of that contract." The clause in the constitution of the State of Florida, under which the above decision was made, says that "one thousand dollars worth of personal property * * * shall be exempted from forced sale under any process of law."

In a well discussed case, a clause in the statute of Illinois, exempting homesteads "from levy and forced sale under any process or order from any court of law or equity," was construed not to exempt from sale under a power given in a deed of trust. Dawson v. Hayden, 67 Ill. 52.

The homestead exemption is entirely the creature of the statute laws of the different states. It is carved out of the real estate owned by the husband, father or mother or other head of the family. By common law, the wife has no interest in her husband's estate, except dower. In relation to the right of the husband, or of husband and wife combined, to alienate the homestead, we are compelled to look to the statute under which the question may arise.

The right of homestead, which has been established with greater or less stringency in at least thirty-four of the states, partakes more nearly of the character of an estate for life than any other, and is treated as coming within that category. 1 Washburn on Real Property, p. 342.

Washburn on Real Property contains a series of the most useful chapters on homesteads yet published. The frequent clauses in the laws on this subject render it necessary for the lawyer to make reference to the statutes, or else he may be mislead by the author; indeed, he cautions his reader against the error he may fall into. We say this without disparagement to the great work of the author from whom we quote with pleasure and satisfaction: "When it is sought to define the nature and character of the property or estate which one has in the homestead which the law creates in his favor, and what rights and duties are attached to the same, it will be found difficult to do more than borrow the language of the statutes and of the courts in construing them in the different states." 1 Washburn on Real Property, p. 380. The same author adds: "This homestead estate is, nevertheless, the subject of sale, mortgage, release, and in some states, of being lost by abandonment. The subject divides itself into the mode in which a conveyance may be made, and how the right of homestead may be lost or abandoned." Ib., vol. 1, p. 405. "The same diversity prevails in the different states, as to how far and by what means a homestead right once acquired can be lost by abandoning the premises, though, as a general proposition, whenever a a new homestead is gained a prior one is lost." Ib., vol. 1, p. 420.

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The various states have scarcely the same statutes in any two instances clearly alike on this subject, yet they are quite uniform in relation to the rights of the wife, and that she has an interest therein, and that she can relinquish, mortgage or abandon it.

The decisions and opinions of the different state courts on this subject would make a large volume. They frequently disagree, merely on account of the different statutes.

The field of American jurisprudence is full of efforts at fraud. In this particular department many attempts have been and are being made to perpetrate fraud on the homestead and exemption laws. We are pleased to find the great weight and predominancy of the decisions, though favoring and respecting exemption laws as alike necessary and humane in behalf of poor and suffering families, yet firm, consistent and honest in resisting the numerous phases of fraud which they assume.

In relation to forced sales, the weight of authority, and we think the force of logic and justice, is that the exemption of homestead or other property from forced sales does not, nor ought it to apply to sales made under a decree of the courts foreclosing a mortgage, or any decree made on a legally executed contract alienating or subjecting to sale property otherwise liable to homestead or exemption laws. W. A. C.

MORTGAGE — PRIORITIES — RELEASE OF FIRST MORTGAGE AND MAKING OF NEW.

SHAFER v. WILLIAMS.

Supreme Court of Illinois.

[Filed at Ottawa, June 21, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

1. A AND WIFE MADE A MORTGAGE to B upon certain property. The acknowledgment was in part defective, and it was so recorded. Some time afterwards the defect was corrected, and the mortgage again recorded. Previous to the second recording a second mortgage was given by A and wife to C upon the same property, which was recorded. Shortly afterwards A and wife gave B a new mortgage on the same premises to secure his old debt, which was duly acknowledged and recorded. A release duly executed by B of his prior mortgage was filed for record with his last mortgage. *Held*, on suit to foreclose the latter mortgage, that the release of the old mortgage and making of the new did not change existing rights, and that the new mortgage of B had priority over the mortgage of C. DICKEY and SHELDON, J.J., dissenting.

2. THE MORTGAGE GIVEN TO B NOT CONTAINING a waiver of the homestead, and the mortgage given to C expressly waiving that right: *Held*, that in the disposition of the proceeds of the sale of the mortgaged property, the balance remaining after B's mortgage, which represented the homestead right in the premises, should go to C, although no cross-bill had been filed by him to foreclose his mortgage, he, however, being made a party in the suit for foreclosure.

CRAIG, J., delivered the opinion of the court:

This was a bill in equity brought by Henry Williams to foreclose a mortgage executed by Chas. F. Morgan and wife, on certain premises in McHenry County, to secure an indebtedness of $3,700. The mortgagor and his wife, together with Chas. F. Morgan and Abraham Shafer, who also held mortgages on the same premises, were mere parties defendants to the bill. A decree of foreclosure was rendered in favor of complainant substantially as prayed for in the bill, to reverse which Shafer alone appealed.

It appears from the evidence that on the 17th day of March, 1868, Morgan borrowed of Williams $3,700, and gave his note for the amount, due in ten years, with interest, and a mortgage was executed to secure the payment of the note, bearing the same date. A certificate of acknowledgement was attached to the mortage, dated September 9th, 1868, which was in the form required by the statute, but the name of the justice was not signed to the same. On September 9th, 1868, the mortgage was recorded. Subsequently, and on the 7th day of October, 1871, the mortgage was again recorded, the certificate of acknowledgement having been signed by "James B. Church, Justice of the Peace," and bearing date September 9th, 1868. Prior to this, however, and on the 12th day of September, 1871, the appellant Shafer, loaned C. F. Morgan $500, and took a mortgage on the same premises, executed by Morgan and his wife, with full waiver of the homestead, which was recorded September 14th, 1871. On the 22nd day of December, 1871, Morgan and wife gave Williams a new mortgage on the premises to secure his old debt, which was duly acknowledged and recorded December 26th, 1871. A release duly executed by Williams of the prior mortgage was filed for record with the last mortgage.

It is conceded by appellant that although his mortgage was executed and recorded subsequently to the one first given appellee, yet the release by appellee of the prior mortgage and accepting the mortgage bearing date subsequent to the one held by him, gave his mortgage the prior lien, and this we understand to be the principal question presented by the record. The second mortgage contains the following clause: "This mortgage is made to secure the identical indebtedness mentioned in the certain mortgage upon the above described lands made by said party of the first part to said party of the second part, bearing date

March 17th, 1868, and recorded in the recorder's office of the recorder of said McHenry County, in book 30 of mortgages, on page 338." The truth of this statement is not controverted. No new note was taken, but the mortgage was given to secure the payment of the original note executed when the loan was first made. Nor does it appear that any substantial difference exists between the two mortgages. The rights and powers conferred by the two are similar in their character, while the right of dower had not been waived by the wife of the mortgagor in the first mortgage at the time it was executed, this defect had been cured, as appears by the certificate of acknowledgement subsequently obtained. The only difference we perceive in the two mortgages is, that the first one did not provide that the whole of the principal debt should become due on the failure to pay interest, while the latter contained that provision.

Where a party acquires a deed of lands upon which he holds an incumbrance by mortgage or otherwise, and the question arises whether the incumbrance is discharged by the conveyance, the intention of the party at the time the deed was obtained will, in a court of equity, be considered the controlling consideration. Campbell v. Carter, 14 Ill. 286; Richeson v. Nockenhill, 85 Ill. 124. If that principle should be applied here—and we perceive no reason why it should not be—the facts surrounding the transaction all point to the conclusion that it was not the intention of the complainant to lose his original lien. The recitation in the mortgage that it was given to secure the identical indebtedness named in the other mortgage, the fact that the original note was not given up and a new one taken, in connection with the other fact that the release of the old mortgage and filing for record of the other one was done at the same time and as one transaction, all indicate that complainant had no intention whatever to give up his original lien on the mortgaged property.

This case is somewhat similar in its facts to Christie v. Hall, 46 Ill. 117, and the rule there announced must control here. In that case Ball gave Hall a mortgage on real estate to secure certain indebtedness, which was in form a deed. Subsequently judgments were rendered against Ball. After the rendition of the judgments Hall conveyed the property to Ball, and at the same time took a new mortgage to secure the indebtedness, giving further time for payment. The party holding the judgments, under these circumstances, insisted that the judgments had priority over the second mortgage, but the court said: "In this case the delivery of the deed of conveyance to Ball, and the mortgage back to Hall, were simultaneous and instantaneous acts. There was no intention of the parties to change their relative rights, but simply to put the mortgage in legal form. And the acts being simultaneous, the title to the land and the rights under the mortgage vested at the same instant of time, and according to what was said in Curtis v. Root, there was no period of time when the judgment-lien could have attached as prior to that of the mortgage." The same may be said of this transaction. The conveyance or release of all rights held by the complainant in and to the premises to the mortgagor, and the execution and delivery of the new mortgage, were simultaneous acts, and no intent was shown to change the relative rights of the parties by the change of the form of the security for the debt.

It is a principle well established that equity always looks to the substance, and not to the form of the transaction to determine its validity. Under this rule, no good reason can be shown why appellant should have priority. When he made the loan and accepted a mortgage, the record disclosed the fact that appellee had a prior lien. This record was constructive notice to him, and all others of appellee's rights, and whatever interest he acquired in the premises was subordinate to those held by appellee. Appellant has in no manner been misled or deceived, and under such circumstances, to give him priority of lien from the fact alone that appellee cancelled of record one mortgage, no portion of his debt having been paid, and at the same time accepted another mortgage, deriving no substantial advantage which he did not previously have, would be neither just nor equitable. The court was, therefore, correct in declaring that appellee's lien was prior to appellant.

The record, however, discloses one serious error. The homestead was not waived in appellee's mortgage, but in the one held by appellant, all homestead rights were waived. It was stipulated that the cause should proceed in the same manner as if commissioners had reported that the premises could not be divided and a homestead set off to Chas. F. Morgan, the stipulation to have the same effect as a report of commissioners that a homestead could not be set off. The court decreed a sale, and, out of the proceeds, after payment of costs, directed $1,000 to be paid Chas. F. Morgan. This was no doubt correct, so far as the rights of appellee were concerned, as he acquired a lien subject to the homestead rights of the mortgagor, but as to appellant, he occupied a different position. Morgan and wife had waived the homestead in the mortgage given him. It is true he did not file a cross-bill and ask to have his mortgage foreclosed, as he might have done, but this fact did not deprive him of his rights when the court proceeded to make a disposition of the proceeds of the sale of the mortgaged premises. Here was $1,000 to go to some person. It represented the homestead in the premises. Appellee had no claim on that fund. Morgan as against appellant was not entitled to it, for the reason he had conveyed the homestead right to appellant. We are therefore of opinion that so much of this $1,000 as was necessary to pay appellant's mortgage should have been decreed to appellant. No cross-bill was required for the purpose. Morgan filed no cross-bill, and yet the money was decreed to him. Upon the same principle it might have been decreed to appellant, as the two stand upon the same footing.

The decree of the circuit court will be so far modified as to require the $1,000 which represents the homestead to be brought into court by the commissioners after the sale, and so much of that

sum as shall be necessary will be awarded appellant to pay his mortgage, and the remainder thereof must be decreed to Morgan. In all other respects it might be affirmed. Other objections of a technical character have been urged against the decree, but we perceive no substantial merit in them.

The decree will be modified as to the $1,000 got from sale of the homestead, and in all other respects affirmed.

DICKEY, J., dissenting:

I concur in the conclusion reached in this opinion, and in the views on which the judgment is placed. I can not concur in what is said as to the priority of the liens. The first mortgage became, in my opinion, a nullity upon its discharge and execution of a new mortgage to secure the same debt. By the new mortgage the mortgagee obtained the dower right of the wife of the mortgagor, and also additional right in making the whole debt due upon failure of payment of any portion when due. On the principle of Campbell v. Carter, *supra*, the first mortgage was gone, and the mortgage taken for the same debt came in subject to the intervening liens.

SHELDON, J., dissenting:

I think that Williams, under his second mortgage, acquired additional substantial rights. Wherefore, under the decision of Campbell v. Carter, the release of the first mortgage should be held operative.

NEGLIGENCE — INJURIES TO INFANT — NEGLIGENCE IMPUTED TO FATHER.

STILLSON v. HANNIBAL & ST. JOSEPH R. R.

Supreme Court of Missouri, April Term, 1878.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, } Associate Justices.
" WARWICK HOUGH, }
" E. H. NORTON, }
" JOHN W. HENRY, }

1. A FATHER having passed through a space of fifteen or twenty inches wide, between the rear cars of two freight trains standing on a side track, within five or ten minutes afterwards returned in company with his daughter, between eight and nine years of age. As the father and daughter approached within five or six feet of the opening, in answer to an inquiry from the daughter as to how he got through, the father pointed out the opening, and in his immediate view the daughter proceeded to follow his directions in passing through the opening, and was injured by the cars going together; the cars being moved by an engine that was about starting one of the trains from the side track. This opening was a few feet east of the east line of a street crossing. One of the trains entirely blocked up the street, and it was not shown that the men in charge of the train knew that any one was attempting to pass through the opening. In an action by the daughter for the injuries sustained: *Held*, 1. That the negligence of the father was imputable to the child. 2. That no negligence on the part of the train men was shown; that the accident occurred at a point where they had a right to presume no one would attempt to cross; and that, where persons attempt to cross a railway at an accidental opening between cars, not in a highway, nor so placed as to invite the belief that it was left open for persons to pass through, they do so at their own peril. 3. That the obligations, rights and duties of railroad companies and travelers crossing them are mutual and reciprocal, and no greater degree of care is required of one than the other.

Appeal from Hannibal Common Pleas Court.

George W. Easley, for appellant; *H. J. Drummond* and *Wm. P. Harrison*, for respondent.

NAPTON, J., delivered the opinion of the court:

The injury which this suit sought to redress, to a bright little girl of eight or nine years of age, remarkably sprightly and attractive, the pet of her father and of the entire village where they lived, is calculated to excite the sympathy of jurors and judges. But in the administration of law considerations of this sort must be discarded, and the case must be investigated and determined upon established legal principles applicable alike to all. The facts in this case, so far as they relate to the circumstances attending this unfortunate accident, are very few and simple, and established mostly by the witnesses for the plaintiff; there is, indeed, a mass of testimony of medical men in regard to the connection between the ill-health of the plaintiff when suit was brought, and the injury which occurred eight years before, and the possibility of its having been occasioned by other causes. We shall omit any reference to this class of testimony, the question being one exclusively for the jury, and no points of law having been made on it in the instructions.

The town of Brookfield, in 1864, when this accident happened, contained about one hundred and fifty inhabitants. The main street, one hundred feet wide, ran north and south through it, crossing the defendant's railroad at right angles. The railroad, running east and west, consisted of three tracks—the main track, and two side tracks south of the main track. The father of the plaintiff had a store-house on the south side of the railroad, east of Main street, and with his wife and daughter boarded at the hotel or eating-house of the village, which was on the north side of all the railroad tracks, and west of Main street. Some time in the morning of June 1st, 1864—it is not material about the hour—Mr. Stillson left his store and crossed over to the hotel, where his wife and daughter were, and in doing so passed through an aperture left between the eastern and western-bound trains on the south side track, which he then found to be about twenty inches. After transacting the business which was the cause of this visit, probably to go to dinner, he was accompanied back by his little daughter the plaintiff, who said to him, as they walked along over the main track, where there were no cars, and over the first side-track where there were either no cars or a wide space between them on the railroad crossing: "Papa, how did you get over?" In answer to this question the father described to the child how he got over, and when they reached the second or south side track, where the crossing on Main street was totally obstructed, he pointed out to his child the place where he got over, and

she, saying, "I will beat you over to the store," tripped along ahead of him; and she found the space between the cars so close, that small and delicate as she was for her age, she had to turn sideways to get her body between the cars. From some cause the cars at this place had moved and diminished the space between them, and she was crushed between them at the waist. Her father was about five or six feet behind her. This was not at the crossing on Main street, which was entirely obstructed by the train bound West, but was several feet east of the line of the street, and between the trains bound East and West. The father had crossed at this opening when he went over to the hotel and found it about twenty inches, and another witness who crossed through the aperture only five minutes before the accident found it between fifteen and twenty inches wide. There was from the west of Main street a gradual declivity of the track towards the east, and at the time of the unfortunate accident, there was a lighted ("live") locomotive at the west end of the train, preparing to start west. The eastward bound train was fastened by brakes and a stick of wood under the wheel near the east end. Of course the diminution of the aperture must have been occasioned either by some impulse imparted by the locomotive at the west end of the train, or by a gradual sliding back of the western bound train which was necessarily not fastened, because on the eve of starting. There was some discrepancy in the testimony as to whether there were any cars at all on the north side-track; but this is evidently immaterial, as the accident occurred on the south side-track.

Upon this state of facts some questions of law obviously arise, which may be considered without any detailed examination of the instructions given to the jury on the trial in the circuit court.

The first question which naturally presents itself in view of the facts, is whether the responsibility of the defendant in this case is varied from that which is ordinarily exacted from it towards persons of mature years, by reason of the tender years of the plaintiff. There are cases in which it is determined that the same degree of care is not to be expected or required from a person of immature age, as would be required of one who had reached years of discretion, and, therefore, that what would be contributory negligence in the one case, would not be considered so in the other. The distinction was recognized by this court, in Koons v. I. M. R. R. Co., 65 Mo. 592. These are, however, cases in which the father, guardian or other protector of the party injured, is not present when the injury occurs. In the present case the father and child were together, and it was not simply a permission on his part that his little daughter should cross the railroad at the point she attempted, but the exact place was pointed out to her by her father, and she was proceeding within his view to follow his directions when the injury happened. If, under such circumstances, the father was guilty of negligence, that negligence must be imputable to the child, in a suit by the child for damages. As was observed by the Supreme Court of Massachusetts in a similar action (Holly v. Boston G. L. Co., 8 Gray, 132), "she was under the care of her father, who had the custody of her person and was responsible for her safety. It was his duty to watch over her, guard her from danger and provide for her welfare; and it was her's to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and duty to exert. Any want of ordinary care on his part is attributable to her, in the same degree as if she was wholly acting for herself."

In Waite v. N. E. Railway Co., 96 Eng. C. L. 728, the question was whether, in an action by an infant for injuries caused to him by the negligence of the defendant, it could be set up by way of defence that the negligence of the person in charge of the infant contributed to the accident. The Court of Queen's Bench held that it could, and in this opinion the Court of Exchequer Chamber concurred. Williams J., said: "There was here, as it seems to me, from the particular circumstances of the case, an identification of the plaintiff with the grandmother whose negligence is, therefore, an answer to the action. The person who has charge of the child is identified with the child. If a father drives a carriage in which his infant child is, in such a way that he incurs an accident, which by the exercise of reasonable care he might have avoided, it would be strange to say that though he himself could not maintain an action, the child could." In Ohio and Miss. R. R. v. Stratton, 3 Cent. L. J. 415, the Supreme Court of Illinois held that the negligence of the parent or guardian having in charge a child of tender years, where it is the proximate cause of the injury, by unnecessarily and imprudently exposing it to danger, prevents any recovery from the carrier corporation.

In the present case, the inquiry should have been whether the father was guilty of any contributory negligence, and whether such negligence, if any there was, was the proximate cause of the injury.

The next conspicuous and important fact in this case is, that the injury did not occur at any street crossing, but on a part of the track where there was not even a private or occasional pathway, and where, consequently, the defendant had a right to presume that no one would attempt to cross. It is true the street crossing was entirely obstructed by the train, which obstruction the municipal authorities of the town might at any time have prohibited, and for which the defendant might have been held liable in damages for any inconvenience occasioned by such obstruction, but this obstruction did not authorize one who was about to cross to attempt to do so at any accidental opening between the cars either of that train or of the adjoining one, except at the peril of the person so attempting to cross.

The obligations, rights and duties of railroad companies and travelers crossing them are mutual and reciprocal, and no greater degree of care is required of the one than of the other. Harlan v. St. L., K. C. & N. *post*. Whilst the highest degree of

care should be exacted from those who operate such dangerous machinery, a corresponding obligation is imposed on the public, outside of passengers on the train, to observe the like caution. Harlan v. St. Louis, K. C. & N. R. R. Co. 65 Mo., 22. It has been held that the neglect of the engineer of a train to sound its whistle or ring its bell on nearing a street crossing does not relieve a traveler in the street from taking ordinary precautions for his safety; that he is bound to use his senses, to listen and to look, in order to avoid any possible accident from an approaching train, and if he fails to do so, he takes the risk. C. R. I. & P. R. R. v. Houston, 5 Otto, 697, 6 Cent. L. J. 132.

But here there was no street crossing. The space left between the two trains, even when the father of plaintiff went over to the hotel (20 inches), would not indicate any invitation even for foot passengers. There was no evidence in the case that any person other than the father of plaintiff and one other person, who was a witness for defendant, had ventured to cross at the point, and it is clear that if the father had preceded his child so as to observe the diminished size of the aperture he would not have advised her to attempt a crossing. Certainly if he observed the lighted ("live") locomotive at the west end, and made an attempt to cross himself or advised his child to attempt it, its recklessness would have been obvious on which to base instructions to a jury. After a careful examination of the testimony in this case, aided by the maps in the record, we have been unable to conjecture in what respect it is claimed there was negligence on the part of the defendant. It does not appear that any officer or servant of the road was aware that the plaintiff or any one else was proposing or attempting to cross at the point where the injury to plaintiff occurred. It does not appear that any bell was rung or whistle sounded, but this is only required when approaching a crossing. The train was about to leave unobstructed the street crossing over which several of its cars extended. The eastern bound train was securely fastened, and the stick of wood under the wheel had to be taken out before the little girl could be extricated. The western bound train being about to start was of necessity not locked. That when the locomotive was fired this train might recede a few feet, is not unlikely, and, indeed, seems the only rational solution of the contact of the two trains. Had the managers of this train then any right to suppose that east of the street crossing, the slight opening between it and the eastern bound train, never over twenty inches, would invite pedestrians to cross through. Was it a customary place to cross, or were not the plaintiff and her father trespassers?

It is useless to analyse the instructions in detail. From what has been said it will be apparent wherein they are objectionable.

Judgment reversed and cause remanded. The other judges concur.

NOTE.—The doctrine of the imputability of the negligence of the parent to the child seems, at first view, to establish a harsh rule, as children of tender years are known to want judgment and discretion; but, on the other hand, the inquiry arises whether this want of personal judgment and discretion, where it has concurred in producing injuries, shall exempt them from all legal rule when they seek redress by action. So anxious have the courts been, prompted by the instinct of common humanity, to protect those of tender years, that they have with great unanimity established the doctrine that in actions brought by them they can not be charged with the consequences of their concurring negligence. This case undertakes to draw a distinction between those cases where the negligence of the parent consisted in permitting the child to go abroad unattended, and those where the parent was present directing the child when the injury occurred. But, in principle, is there any real distinction? Upon what ground is it that the child can be bound by the act of the parent, or other person standing in that relation? It can rest upon nothing but the fact that he is entitled to the custody and control of her person; that the law clothes him with the authority to guide and control her actions, and imposes on the child the corresponding duty of obedience. In other words, society and the laws of our very nature have constituted the parent the agent to look after, care for and protect the infant, and that obligation of protection on the part of the parent, and of obedience on the part of the child, does not cease the moment the child quits the immediate presence of the parent. I am aware that it was on the ground of agency that Cowen, J., based his opinion in Hartfield v. Roper, 21 Wend. 615, which has been almost universally disapproved, but the reasoning of which has never been answered.

The principle that negligence can not be imputed to an infant of tender years, carried to its logical conclusion, would protect them from actions for any torts committed by them.

The reason assigned for the rule is their want of judgment and discretion. And if this furnishes the test of liability, why should not a lunatic be also excused? And if ignorance of the consequence of the act excuses infants and lunatics, why shall it not excuse any other person when satisfactorily shown?

But the liability to answer in damages for personal torts does not depend upon the mind or capacity of the wrong-doer. "Though a lunatic is not punishable criminally, he is liable to a civil action for any tort he may commit." 1 Chit. Pl. 66, and cases cited. An infant under the age of seven years has been held liable for a personal tort. McGee v. Willing, 31 Leg. Int. 37. And one of twelve years, in trespass for an assault. Bullock v. Babcock, 3 Wend. 391. And it has been said that trespass would lie against an infant though only four years of age. 24 Hen. 6, 11*b*.

Infants, in the same manner as adults, have been held liable for trespass, slander, assaults, etc. Bing. on Infancy, 110. An infant has even been held for a trespass, although he committed it by his father's command, Humphrey v. Douglass, 10 Vt. 71; or through the agency of a third person, Sikes v. Johnson, 16 Mass. 389. In equity, infancy is no protection for the commission of a fraud. 1 Sto. Eq. 385.

It may be said that these are all acts of commission, and that negligence is an act of omission. It would be strange if an infant of tender years can be held for the consequences of his own acts in every instance, except those acts which result in injury to himself.

The rule that the negligence of the parent, or person standing in that relation, when immediately present, is the negligence of the child, has never been denied as incorrect in principle, though the courts have in many instances found reasons, on the particular facts of the case, for refusing its application. Ihle v. R. R. Co., 42 N. Y. 318, was decided upon the express ground that the attendant was not negligent. In the case of B. & I. R. R. Co. v. Snyder, 18 Ohio St. 399, the attendant was only eleven years old, and it was not shown that she had done anything that contributed to the injury. In

North Pa. R. R. Co. v. Mahoney, 57 Pa. St. 187, the child was taken into the arms of one not placed in charge of it — a mere volunteer—and by the negligence of such person was injured. In Pittsburg Railway Co. v. Caldwell, 74 Pa. St. 421, the plaintiff was injured by being pulled off the train by her companion. The court lays store to the fact that the plaintiff was not in charge of that person. In Koons v. St. L. & I. M. R. R., 65 Mo. 392, in discussing the question of the negligence of the parent, Napton, J., said: "There is not a particle of evidence that the father permitted his son to go upon this turn-table," leaving the inference quite clear that if he had permitted the act, it would have been negligence, and if he had directed it he surely would have been grossly negligent. In O'Flaherty v. Union Ry. Co., 45 Mo. 70, the record shows that the child escaped unobserved by its elder sister (only eight years old), and got hurt without her knowledge.

In every case where the parent or person who had a right to command obedience from the infant was immediately present, and could have exercised authority and judgment, the negligence of the parent has been imputed to the child. The authority of Lynch v. Nurden, 1 Q. B. 39, on which Redfield, J., relied in Robinson v. Cone, 33 Vt. 213, is now doubtful. See Lygo v. Newbold, 9 Exch. 302.

The disabilities of tender years should only be taken into account for the purpose of determining the degree of care required of the other party. What would be such care as would excuse an injury in the case of an adult, might be gross negligence in the case of an infant of tender years.

An engineer observing an adult upon the track may act upon the presumption that he will step aside from a position of danger. Indianapolis & Vincennes R. R. Co. v. McClaren, Admr., Supreme Court of Indiana, February 20, 1878. But if he should observe a young child on the track, and drive his engine forward as he might reasonably do in the case of an adult, he would be guilty of wanton recklessness, for which the company would be liable. The test of liability can be measured by the degree of care that our better natures would impel us to attempt in each particular case. The same effort to stop the train would not be exacted when the child was on the track with its father as when alone, because it would be a natural presumption that the child would be governed by its father and removed to a place of safety.

In discussing the question of the negligence of children, Mr. Pierce says: "The knowledge, then, of the company that such disabled persons are in danger is to be taken into consideration in determining whether it has fulfilled the requirements of ordinary care, and in the absence of such knowledge the same acts of negligence which would preclude a person of full age and capacity from redress, would also preclude them." Pierce Am. R. R. L. 280, 281.

The other points decided in the main case are but the announcement of rules that commend themselves to the good judgment of everyone. G. W. E.

AMONG the witnesses at the trial of Hodel, the assassin, was a young man, a very vigorous speaker and active demonstrator, who persisted, when handed the revolver, in pointing it at the President of the Court, just to show how the prisoner had aimed it at the Emperor. "Don't point it at me," exclaimed the Judge, "it's loaded in two chambers." "All right, sir," remarked the witness. "I'll take care. Hodel held the revolver just like this———." "Put it down," shouted the usher. "Take the weapon away from him," shouted one of the court as the judge ducked his head in anticipation of an accident. And the witness was relieved of the pistol and bundled off to his place without more ado.

ATTORNEY'S LIEN — PRIORITY OVER CREDITORS.

BROWN v. BIGLEY.

Tennessee Court of Chancery (Nashville) April Term, 1878.

Before HON. W. F. COOPER, Chancellor.

THE lien of a lawyer on land for professional services, declared by order of the court in the case in which the services were rendered, is entitled to priority of satisfaction over the lien of a judgment-creditor of the client acquired by subsequent decree of the chancery court, sale thereunder, and purchase of the land, where the bill to enforce the lawyer's lien is filed before the sale is confirmed.

Brown & Reed, for complainants; *Bate & Williams*, for defendants.

COOPER, C.:

The question sought to be raised by the demurrer in this case, and argued by the counsel, is whether the lien of an attorney for professional services on land, declared by the court in the suit in which the services were rendered, has priority over the lien of a creditor of the client acquired subsequently by bill filed and decree of this court before the attorneys have taken any step to enforce their lien.

The land in controversy was originally the property of E. B. Bigley, the father of the defendant D. W. Bigley, and was by him conveyed in mortgage to the Nashville Building Association, and afterwards in trust to secure a debt due to one A. J. Baker. The Building Association sold and bought the land under its mortgage and then conveyed it, on the 28th of June, 1870, to the defendant D. W. Bigley. On the 10th of April, 1871, A. J. Baker filed his bill in this court against the Building Association and the Bigleys, seeking to set aside the mortgage to the Association as fraudulent, and to subject the land to the satisfaction of his debt under the trust deed, and, if this could not be done, to redeem. The complainants, Brown & Reid, eminent solicitors of this court, were employed professionally by the Bigleys in that cause, and rendered valuable services in its successful management in behalf of their clients. Such proceedings were had in this suit that, first, by the decree of this court, and, secondly, upon appeal, by the decree of the supreme court, the last decree being rendered on the 27th of February, 1875, Baker's bill was dismissed, and the title of D. W. Bigley sustained. By the same decree, the complainants, Brown & Reid, were declared to have a lien on the land in controversy for the fee due them from the Bigleys for their professional services. On the 8th of March, 1878, they filed this bill for the enforcement of the lien, against D. W. Bigley and certain voluntary grantees under him. On the 13th of March, 1878, the bill was amended by making Benjamin Culbertson, Isaac F. Baker and I. I. Green, parties defendant. The amended bill alleges that these defendants, in November, 1877, recovered a decree in this court against D. W. Bigley and oth-

ers, for the sale of the land in controversy, and that, under this decree, the land was sold on the 2d of March, 1878, and purchased by said defendants.

The demurrer is filed by these defendants, and has been argued as if the demurrants were creditors of D. W. Bigley, and, as such, had, by the proceedings commenced since the declaration of the complainants' lien by the supreme court, obtained the decree of November, 1877, for the sale of the land in satisfaction of their debt. But the bill does not disclose the nature of their demand, nor against whom it exists, nor when nor how it originated, nor when the suit was instituted, under which the decree was rendered. It simply states that the complainants are ignorant of the nature and validity of the claim. The fifth cause of demurrer assigned is, that the bill fails to show any equities against the defendants, and is probably well taken. But the demurrer has not been relied on in that view. The argument has been addressed to the respective priorities of the litigants, as if the facts were before the court by the pleadings as they have been orally presented. I will treat the case accordingly, although, it is obvious, the bill ought to be amended so as to show the facts, if the parties expect to have their rights permanently settled by a decree on the demurrer.

A point is made in the demurrer and argument, on the effect of the Act of 1877, Ch. 120. That Act provides: "That the title to real esate shall not be in any manner affected, as to third parties, by any lien acquired by any judgment, decree, bill in equity, judicial attachment, *lis pendens*, levy of attachment, or levy of execution, without actual notice thereof, till an abstract of such proceedings shall be filed for record in the register's office." But that act is a two-edged sword in the present case as it stands. If the complainants' lien as declared is of no validity without registration, neither is the defendants' decree, for it does not appear to have been registered. The sale and purchase of the land under the decree amounts to nothing until confirmation. The rights of parties must be determined as if no such act had ever been passed. Besides, the want of actual notice is a matter of defense by proper pleading, and the complainant's lien is, perhaps, not included in the specific enumeration of the statute. Moreover, the statute does not purport to act retrospectively, and the rule. in such case, is to treat it as operating only upon future rights. Wood v. Orr, 10 Yerg. 505.

The stress of the argument, as well as the main point of the demurrer, rests upon the fact that the bill fails to show any registration of the lien as declared by the decree of the 27th of February, 1875, or any step taken to enforce it until after the demurrants, considered as creditors of D. W. Bigley, had acquired their rights by decree. The issue made involves the nature of a lawyer's lien, and the effect of its being declared by decree in the suit in which the services were rendered.

In England, and the rule has been generally followed in this country with an extension to the honorary fees of counsel, the solicitor has a lien upon his client's deeds, or other papers, which applies to all costs as between solicitor and client. This is a lien which he can not actively enforce, and which amounts to a mere right to retain the papers as against his client until he is fully paid. He is also entitled to a lien upon the fund realized by his services, which is confined to the costs of the particular suit, and which he can actively enforce by order in that cause. Turwin v. Gibson, 3 Atk. 719: Bozon v. Bollard, 4 M. & C. 354; Stedman v. Webb, 4 M. & C. 346; Welsh v. Hole, Doug. 238; Read v. Dupper, 6 T. R. 361; *In re* Paschal, 10 Wall. 483; McGregor v. Comstock, 28 N. Y. 237: Rooney v. Second Ave., etc., 18 N. Y. 368. The lien is on the recovery, and does not prevent the client from compromising, or receiving payment before judgment, nor afterwards, unless notice of the lien be given to the debtor. Moore v. Anquell, 2 New Pr. Cas. 194; Marshall v. Meech, 51 N. Y. 140; Pulver v. Harris, 52 N. Y. 73. To the same effect was the decision of our supreme court in Hoag v. Avery, at Jackson, April term, 1866, cited in 1 King's Dig., § 970, and Heisk. Dig. § 224. But this case is probably overruled, without being cited, in Pleasants v. Kortretcht, 5 Heisk. 694. In England, the lien has been regulated by statute, 23 and 24 Vic., ch. 127, § 28, and made much more effective. Jones v. Frost, L. R., 7 Ch., App. 773.

In Barnesley v. Powell, Amb. 102, the solicitor filed a petition, stating that he had expended large sums in prosecuting suits on behalf of Barnesley, who was a lunatic, against the defendant, Powell, and praying that he have liberty to enter up a judgment against the lunatic for such moneys, "that thereby he may have a lien on his real estate." Lord Hardwicke thought that the remedy of the petitioner was against the committee of the lunatic who had employed him, but said that the committee had a lien on the lunatic's estate, both real and personal, and that the court would assist the solicitor by declaring him to stand in the place of the committee, and a decree was so entered accordingly. Chancellor Kent refers to this decision in the matter of Southwick, 1 Johns. Ch. 22, and treats it, and the like ruling in *Ex parte* Price, 2 Ves. 407, as subrogating the solicitor to the lien of the committee, adding that the remedy of the solicitor is, ordinarily, at law. But the report in Ambler makes Lord Hardwicke say: "If a solicitor prosecutes to a decree, he has a lien on the estate recovered in the hands of the person recovering for his bills; but if the client should die, the solicitor has no such lien on the estate in the hands of the heir at law, unless it should be necessary to have the suit revived, and then the lien will revive too." But this *dictum*, so far as it implied a lien on real estate, was summarily overruled by the House of Lords, in Shaw v. Neale, 6 H. L. C. 581, 591. The counsel for the solicitor in that case, which raised the direct question of a solicitor's lien on land, cited Barnesley v. Powell, and said: "There is no question but that the solicitor would be entitled to a lien on a fund in court, or on the papers in his hands, and there is no principle on which to distinguish between a fund obtained by the prosecution of a suit, and an

estate obtained in the same manner," p. 589, to which the following interjectional responses were at once made by two of the learned lords: Lord Wensleydale. "I never heard such a proposition at law." Lord St. Leonards. "Nor I in equity." The American cases are in accord. Smalley v. Clark, 22 Vt. 598; Stewart v. Flowers, 44 Miss. 513; 20 Ark. 667.

The difficulty in extending the solicitor's lien in England grew out of the courts treating it as a legal right, and, consequently, dependent upon possession. A lien at law, it has been said, is not in strictness either a *jus in re* or a *jus ad rem*, but simply a right to possess and retain property until some charge attaching to it is paid or discharged. But there are liens recognized in equity whose existence is not known nor obligation enforced at law, and in regard to which it may be stated generally that they arise from constructive trusts. They are, therefore, wholly independent of the possession of the thing to which they are attached as a charge or encumbrance, and they can be enforced only in a court of equity. Sto. Eq. Jur., § 1217. The vendor's lien for unpaid purchase-money, where he has parted with the title, is a noted instance. Mackreth v. Symmons, 15 Ves. 329; Brown v. Vanlier, 7 Hum. 239. The lien of a purchaser of land who has paid a part of the purchase-money, and the vendor is unable to make a title, is another. Rose v. Watson, 10 H. L. C. 672; Burgess v. Wheate, 1 Eden, 211. So, the lien of a person who has made permanent improvements on land under a void contract of purchase; Mathews v. Davis, 6 Hum. 824; or under a parol gift; Ridley v. McNairy, 2 Hum. 174; or where there has been a rescission. Humphreys v. Holtsinger, 3 Sneed, 229. So, the lien of a joint purchaser for excess of payments or improvements. Sweat v. Henson, 5 Hum. 49; Pearl v. Pearl, 1 Tenn. Ch. 206. The lien of a trustee for advances. Worrall v. Harford, 8 Ves. 8. The lien of one partner on partnership property, no matter in whose name the title may be. Taylor v. Fields, 4 Ves. 396; Cammack v. Johnson, 1 Green Ch. 163; Haskins v. Everett, 4 Sneed, 531. The resulting trust arising from the payment of the purchase-money. Smitheal v. Gray, 1 Hum. 591.

The inclination of the courts of this country, and of none more so than those of this state, has been to enlarge the doctrine of equitable liens and charges, with a view to the attainment of the ends of justice, without much respect for the technical restrictions of the common law. It was a logical result of this tendency that our supreme court should follow the lead of Lord Hardwicke, made before the revolution, rather than the modern doctrine of the House of Lords. And it was both natural and wise that the lien of the lawyer on the fruits of his professional labor should be treated as equitable, rather than legal. The proper administration of justice is essential to the well-being of the Republic, and can not be secured without an enlightened and prosperous bar. The distinction, moreover, between land and personalty, in the comparative immunity of the former from liability and charge, which existed in our mother country, has never prevailed in the United States. And there is, therefore, point with us in the remark of counsel in Shaw v. Neale, that there is no principle in which to distinguish between a fund and an estate obtained by the prosecution of a suit. Under these circumstances our supreme court, in Hunt v. McClanahan, 1 Heisk. 503, reached the conclusion that lawyers were entitled to a lien on the property recovered, or protected by their services, real as well as personal, which would be declared by the court upon the application of the attorney by petition, in the suit in which the services were rendered. "We hold," says the learned judge who delivered the opinion, "that an attorney is entitled to an equitable lien on the property or thing in litigation for his just and reasonable fees, and that the client can not, while the suit is pending, so dispose of the subject-matter in suit as to deprive the attorney of his lien, *nor afterwards to any purchaser with notice*. The pendency of the suit is, of itself, notice to all persons, *and the lien may be preserved, and the notice extended* by stating its existence in the judgment or decree. And it was referred to the master to hear proof, and report what would be reasonable compensation to the petitioners; and, it is added, "their lien, to that extent, will be declared as having existed from the commencement of the suit, and be enforced by a proper decree."

In Perkins v. Perkins, 9 Heisk. 95, a case decided a year afterwards at Nashville, the general principle announced in Hunt v. McClanahan was recognized, but the practice of making a reference to ascertain the fee was limited to cases where the client is under disability, and the practice of enforcing the lien to such cases, and cases where the client *sui juris* might agree with the attorney as to the amount of his fee. In the case of disability, the proceeding is *in invitum*, and notice must be given the client, who is entitled to be properly represented. If the client be *sui juris*, and do not agree with the attorney as to the amount of the fee, it was said that the court should do no more than declare the lien, leaving the attorney "to enforce his claim by an appropriate proceeding against his client." Both these cases were chancery suits, and did not, therefore, raise the point as to the jurisdiction of any other court to enforce the lien. And in the first case, where the application was made in the supreme court, nothing was said in reference to the jurisdiction of that court to enforce a lien by proceedings *in invitum* commenced in that court.

Under these two decisions I sustained a reference, upon the application of the solicitors of a lunatic and a married woman, in Yourie v. Nelson, 1 Tenn. Ch. 614, and a similar reference, where the services were rendered for infants, in Bowling v. Scales, 1 Tenn. 618, and Carter v. Montgomery, 2 Tenn. Ch. 455. In the cases of the lunatic and the infants, I recognized the principles that the committee of the lunatic and the guardian of the infants were the persons entitled to the lien, and that the solicitor obtained relief by way of subrogation, following, in this respect, Stewart v. Hoare, 2 Bro.

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C. C. 662, and Barnesley v. Powell, Amb. 102. The principal ruling in Perkins v. Perkins has been recently repeated in Steel v. Chester, 1 Tenn. Leg. Rep. 211.

Considering it, then, as settled that the lien of the attorney may be declared in the suit in which the services are rendered, and that the attorney must then enforce the lien by appropriate proceedings "in a court having jurisdiction of the question," the complainants were entitled to file the present bill. For the enforcement of equitable liens belongs to this court, and the appropriate mode of proceeding is by original bill. Clearly, too, the lapse of time since the services were rendered and the lien declared offer no obstacle to the assertion of their rights as between them and their late client, Bigley. In the case of a personal judgment, the lien of the attorney may be extended beyond its rendition by notice to the debtor, so that it will not be lost by several years' delay. Stone v. Hyde, 9 Shepley, 318. And then the lien is binding upon an assignee of the judgment. Cunningham v. McGrady, 2 Baxt. 141. In like manner, if the title of the client to the land depends upon the decree in which the lien is declared, so as to be notice to any person acquiring a title under the debtor, or if the declaration of the lien be itself notice, then the delay would not prejudice the right as to any person subject to be affected by notice. But the argument is that the lien, like that of the vendor who has parted with the title, is purely equitable, and that creditors are not affected by notice. Roberts v. Rose, 2 Hum. 145, and Fain v. Inman, 6 Heisk. 5.

The attorney's lien, according to the decision in Hunt v. McClanahan, dates from the commencemencement of the suit in which the services were rendered, the pendency of the suit being itself notice to all persons of the existence of the lien, and the court add, "the lien may be preserved, and the *notice extended* by stating its existence in the judgment or decree." It has not been contended, and, I presume, can not be that the "notice to all persons" given by the pendency of the suit would not affect the creditors of the client, as well as purchasers under him. The lien would, otherwise, be of little value. But if the notice given by the pending suit includes creditors, the notice extended by stating the existence of the lien in the decree must equally include creditors. The court manifestly contemplate that the notice thus extended shall have all the efficacy of the notice by *lis pendens*. In this view, the point must be considered as settled by the decision of the supreme court in Hunt v. McClanahan. And the distinction between the lawyer's lien and the vendor's lien is, that the former is an actual lien declared by record which fixes the right and is "notice to all persons," while the latter is "a mere capacity to acquire a lien" by taking proper proceedings, and not a lien until these proceedings are taken. Fain v. Inman, 6 Heisk. 15.

It is assigned as a ground of demurrer that the bill does not show any registration of the decree declaring a lien, our registry laws looking to notice of liens on realty in that mode to affect the rights of creditors. But there is no provision for the registration of such a lien, nor of a decree, in the attitude of the decree in question, if we treat the declaration of the lien as a judgment or decree. The Code, § 2030, sub-sections 15, 16, 17, only provides for the registration of judgments or decrees when rendered in a county other than that of the defendant's residence, where it divests and vests title, and where the object is to acquire a lien on equitable estates. But this decree was rendered in the county of defendant Bigley's residence, does not purport to divest and vest title, and the estate sought to be reached is legal, not equitable. Moreover, the Code, § 2075 only makes instruments, which are required by law to be registered, void, if unregistered, "as to existing, or subsequent creditors of, or *bona fide* purchasers from the makers without notice." But a right acquired by judicial decree on the property of the client can scarcely be construed to be the act of the latter so as to bring him within the word "makers" of the statute. And judicial sales, it is settled, and *a fortiori* judicial charges and liens, are not within the purview of the registry laws. Floyd v. Goodwin, 8 Yer. 484; Dromgoole v. Spence, at Nashville, February 16, 1878. And the declaration of a lien is clearly not a judgment which must be executed within the year in order to its efficacy, for the judgment contemplated by the statute is a moneyed demand for which an execution may issue. Code § 2982. It is a mere charge, and not "a determination of the rights of the parties," under the Code, § 2970. Whatever may be the effect of declaring the lawyer's lien, and I am bound by the decisions to give it some effect, there is nothing in the statutes which requires it to be registered in order to have that effect, nor limiting its duration to any specified time short of the ordinary period of limitation applicable to the particular demand.

The demurrants in this case, upon the facts on which their rights have been rested in argument, and which I am taking for granted although not stated in the bill, are judgment-creditors of Bigley. "No man," says the master of the rolls, "can call a judgment-creditor a purchaser; nor has such creditor any right to the (debtor's) land; he has neither *jus in re* nor *ad rem*. All that he has by the judgment is a lien on the land." Brace v. Duchess of Marlborough, 2 P. W., 491. At law, a judgment is a general lien on the legal interest of the debtor in his real estate, but in equity that general lien is so controlled as to protect the rights of those who are entitled to an equitable interest in the land, or the proceeds thereof, or who have an equitable lien or charge equally as meritorious as that of the judgment-creditor. The court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment-debtor has in the estate. Burgh v. Francis, Finch 28; Finch v. Earl of Winchelsea, 1 P. W., 282; Matter of Howe, 1 Paige, 125; Keirsted v. Avery, 4 Paige, 15; Brown v. Pierce, 2 Wall. 205, 218. And a purchaser under the execution in such case with notice certainly, and in some instances without notice, will take subject to the equity. Or, to use the language

of our own supreme court, a purchaser at execution sale takes precisely as the defendant held, subject to all equities that he was, and liable to convey to others as he was. Berry v. Walden, 4 Hayw. 174; Whitworth v. Gaugain, 3 Hare, 416, 425; White v. Carpenter, 2 Paige, 217, 267; Moyer v. Hinman, 13 N. Y., 180; Siemon v. Schurck, 29 N. Y. 598; Freeman v. Mebane, 2 Jones Eq. 44. And, *e converso*, an equitable or imperfect lien or title, which will be good against the defendant in a judgment, is equally good against the judgment-creditor, or purchaser with notice under the judgment. Bank v. Campbell, 2 Rich Eq. 191; Delaire v. Keenan, 3 Des. 74; Hoagland v. Latourette, 1 Green. Ch. 254, Gouverneur v. Titus, 6 Paige, 347. It was upon these general principles that the lien of a vendor for unpaid purchase-money, although he had parted with the title, was preferred in equity to the claim of a judgment-creditor, or a purchaser under his execution. 2 Sto. Eq. Jur. § 1228.

The policy of our registration laws has been allowed to overrule the general doctrine in the case of this particular lien, although not embraced within the letter of these laws. But a different conclusion has been reached in relation to other equities, resting upon the same principles, where the analogy of the registration laws was less obvious. Thus, the equity of a joint owner of real or personal property to be re-imbursed the excess of his expenditures in the purchase or improvement of the joint property, or otherwise created, is held to be superior to the right of a judgment-creditor of the co-owner seeking satisfaction out of his interest. Colman v. Pinkard, 2 Hum. 185; Sweat v. Henson, 5 Hum. 49; Williams v. Love, 2 Head, 80; Withers v. Pemberton, 3 Coldw. 56. So, of the lien of a partner on partnership property, without regard to the question of the legal title, as against individual creditors of the other partner. Haskins v. Everett, 4 Sneed, 531, and other cases *ut supra*. So, of the equity or trust resulting from the payment of the purchase-money. Thomas v. Walker, 6 Hum. 93; Sandford v. Weeden, 2 Heisk. 81. So, of the lien of a trustee for advances, or expenditures for the benefit of the trust estate. Shacklett v. Polk, 4 Heisk. 113; Morrison v. Morrison, 7 D. M. & G. 226; Perry on Trusts, § 907. The lawyer's lien seems to fall within these classes, rather than within the analogy of the vendor's equity. For it is difficult to see how the policy of the registry laws can affect an equitable lien which is not required, nor authorized to be registered; which, it is to be hoped, is "not quite a myth," and which is an actual lien judicially declared, and not "a mere capacity to acquire a lien."

The underlying principle of the decisions touching these equitable liens as against creditors is, that the creditor's right is to subject the property of his debtor. He has no right to subject the interest of a third person in the property of the debtor, even if it be a mere lien or equity. All the authorities agree that, independent of the registration laws, the creditor's equity is, at most, only equal to the equity of the third person, in which case the fundamental rule is, *qui prior est in tempore potior est in jure*. The doubt in the authority is, how far chancery will interfere to assert the prior equity against the legal title acquired under the junior equity *with notice*. 2 Lead. Cas. in Eq. 94, American notes to Basset v. Nosworthy. In the case before us the legal title has not yet been acquired by the demurrants. The complainants have the prior "equitable lien" with "notice to all persons" by the declaration of the lien in the decree of the supreme court. The demurrants have the junior equity acquired by the bill, decree and sale of this court, the sale not having been confirmed, nor of course any title vested. The superior equity is still with the complainants, except to the extent of the costs incurred by the demurrants before the filing of complainants' bill.

CORRESPONDENCE.

ENGRAFTING EXCEPTIONS ON STATUTES OF EXEMPTION.

To the Editor of the Central Law Journal:

I have noticed with interest an article in the April-May number of the *Southern Law Review*, devoted in part to the question, whether an insolvent debtor can convert his assets into that specific kind of property which the statutes declares shall be exempt; and a letter in the CENTRAL LAW JOURNAL of June 14, 1878, p. 474, on the same subject.

Considering how frequently the question might have been presented, it is strange how seldom it has been before the courts. This, I think, is because, in the numberless cases naturally involving the question, it has been thought by the profession until quite recently that the courts could not declare an exception to the right of exemption when the statute had made none. However this may be, the point is now dignified by a conflict of authority, and the frequency with which it must be met gives to it an importance which justifies its most careful consideration.

The constitution of Wisconsin requires the legislature to exempt a reasonable amount of property from seizure or sale for any debt contracted after January 1, 1849. Pursuant to this, the legislature has declared that the "dwelling-house" "owned and occupied by *any* resident of this state," shall be exempt from seizure or sale for "*any* debt or liability contracted since January 1, 1849." So far as this question is concerned, the provisions in other states, and as to other exemptions, are substantially the same.

An insolvent debtor residing within this state and purchasing a homestead which he occupies, as to any debt contracted since January 1, 1849, is certainly within the language of this statute. There is no possible way by which such a case can be withdrawn from the operation of the law but by creating an exception or proviso which will qualify every material clause in it, and which could hardly be expressed more briefly than this; provided, that if such dwelling-house is purchased whilst the owner is insolvent it shall not be exempt as to debts existing at the time of its purchase. That would be a stronger case of judicial legislation than has yet been attempted with any other statute. "General words in a statute must receive a general construction, and if there is no express exception the courts can create none." "The proposition, however it may once have been held or considered, that the courts, upon what is termed an equitable construction or otherwise, may, against the plain lan-

guage of the statute, and in opposition to the intent clearly expressed by the words, mitigate the 'violence of the letter' by introducing exceptions where the statute itself contains none, so as to relieve in cases of hardship or particular inconvenience, has been too long and too frequently rejected to be now the subject of serious argument or doubt.". Dixon, C. J. in Duckling v. Simmons, 28 Wis. 276. The authorities cited in this opinion show it be in accordance with the rule elsewhere.

But not only the plain language, but the reason and policy of the statute require the allowance of the exemption, although acquired when the debtor was insolvent. The homestead law intends, to some extent, the protection of the debtor, but more than this the independence of the family, and through this the welfare of society which is its paramount aim. "The wife and children even more than the debtor are the intended beneficiaries of this legislation." See article by Judge Dillon, 1 Am. L. Reg. 646; Robinson v. Wiley, 15 N. Y. 494; Parsons v. Lionigston, 11 Iowa, 106.

Manifestly the debtor and his family *need* this asylum just as much whether he was insolvent when it was acquired or not. Surely the welfare of society requires that the independence of the family should be sustained by the influences of a home, whether it was founded during the adversity or prosperity of the debtor. And the hardship to the creditor is no greater in one case than in the other. The law says to the creditor that the debtor, who has no homestead, may acquire one which shall be exempt from any debt contracted since 1849, and the credit is given in view of this legal right of the debtor. The creditor has the same notice of the *right* of the debtor to a homestead, where the homestead is not yet acquired, as where it is acquired when the debt is contracted. The legislature deemed the hardship to the family and the evils to society that would flow from depriving the debtor of his home greater than the injury to the creditor caused by securing such home from seizure and sale to pay debts. And by apt words the legislature has, in this statute, enforced this superior right of the debtor and his family by permitting the acquisition of a homestead without any limitation or exception concerning the debtor's financial condition at the time of its acquisition.

Although the homestead exemption is, perhaps, founded upon broader grounds of public policy than some of the exemptions of personal property, as to this question, there can be no distinction between the two. If a debtor, owing $10,000, and having $1,000 in cash, but no other assets, can not buy a home which will be exempt, he can not purchase with it furniture, clothing, or anything else, that will be exempt. He could not buy a coat or a pair of boots. For no limitation not found in the statute, as to kind or amount, can be adopted which is founded upon any *principle*. If the courts say such a debtor may buy $100 worth of clothing, but may not buy $500 worth of furniture and tools in trade, or a homestead for $1,000, what is that but *making law*? It is qualifying the general exception which is sought to be engrafted on the statute, so that that exception when fully expressed is more extensive than the law itself.

True, courts frequently recognize exceptions to rules of the common law generally expressed in imperative terms. The courts, however, do not *create* such exceptions. They are a part of the common law as much as the rule itself. This statute changes the common law, and for the courts to engraft upon it the proposed exception is as unjustifiable as it would be for them to make an exception to a rule of the common law when such exception never existed in the common law.

It is sometimes said it is *fraudulent* for an insolvent to convert his assets into exempt property. That can not be true if the policy and unambiguous language of the law authorizes it, to the extent which the law specifies the debtor may *lawfully* prefer his family to his creditors. The statute, I admit, is unwise in so far as it does not limit the value of the authorized homestead. The injustice of withholding a homestead of enormous value from creditors is, however, about the same, whether the debtor became insolvent before or after its acquisition. At any rate, the operation of the statute as to the *kind* of property exempted can not be affected by the limitation or want of limitation, as to value. The construction in this respect must be the same, whether the value be limited to one, ten or one hundred thousand dollars.

The only decisions against the right to such exemption, where the question has been fairly and directly involved, have been in the inferior federal courts, where the question has arisen in the enforcement of the bankrupt act. The policy and language of the state statute were not discussed. Those decisions are Pratt v. Burr, 5 Biss. 36; *Re* Wright, 8 B. Reg. 431; *Re* Boothley & Gibbs, 14 B. R. 223. The case of Riddle v. Shuly, 5 Cal. 488, is regarded as overruled by Randall v. Buffington, 10 Cal. 493. See *In re* Henkle, 2 Sawyer, 305.

The contrary is held by Cipperly v. Rhodes, 53 Ill. 346; O'Donnell v. Segar, 25 Mich. 568; *In re* Henkle, 2 Sawyer, 305; Buffington v. Randall, 10 Cal. 493; North v. Shearin, 15 Tex, 174; McManus v. Campbell, 37 Tex. 174; s. c., 32 Tex. 442; Tucker v. Drake, 11 Allen (Mass.). 52. Of the text books, Bump on Fraud. Con. p. 242, and Smythe on Homesteads, §232, adopt the same view. The question seems not to have been noticed by any other text-book. The case of Tucker v. Drake, *supra*, is not cited by Mr. Bump or Mr. Ordway. The court say: "If a debtor, *knowing that he is unable to pay his debts*, purchases property exempt from levy on execution, he exercises a privilege which the law gives him and wrongs no one. If he buys provisions for his family, or a cow, or necessary clothing, he merely puts his property in a shape which the humanity of the law authorizes. And there is nothing to distinguish the exemption of a homestead from the like exemption of personal property. * * * * He conceals no property. He merely puts his property into a shape in which it will be the subject of a beneficial provision for himself, which the law recognizes and allows." pp. 146, 147.

GEO. G. GREENE.

Green Bay, Wisconsin.

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

[Filed at Springfield, June 24, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE, }
" T. LYLE DICKEY, }
" BENJAMIN R. SHELDON, } Associate Justices.
" PICKNEY H. WALKER. }
" JOHN M. SCOTT, }
" ALFRED M. CRAIG. }

CRIMINAL LAW — KEEPING GAMING TABLE — AMENDMENT OF AFFIDAVIT.—An affidavit was filed before a justice of the peace, charging appellee with "keeping a common gaming table without a license for the same." A warrant was issued, reciting that this charge had been made, upon which appellant was arrested. Trial was had, which resulted adversely to appellant. There was nothing in the record showing that appellant's trial and conviction was for any other

offense than that charged in the affidavit. The court through SCHOLFIELD, C. J., say: "That the affidavit might have been amended, we have no doubt. It was in the nature of an information which, at common law, was always held amendable. In Rex v. Wilkes, 4 Burrow, 320, Lord Mansfield says: 'There is great difference between amending an indictment and amending an information. Indictments were framed upon the oaths of a jury, and ought only to be amended by themselves, but informations are as declarations in the king's court. An officer of the crown has the right of framing them originally, and may with leave amend in like manner as any plaintiff may do.' This principle is equally applicable obviously to all prosecutions commenced by affidavit. It is in consonance with the spirit of modern legislation, in regard to practice, and we are unable to conceive of a single substantial reason why amendments should not be allowed to affidavits upon which criminal prosecutions before justices of the peace are predicated," The court hold, however, that the record does not show that the affidavit was properly amended so as to bring the offense within the statute, which reads: "Whoever keeps, or suffers to be kept, any tables or other apparatus for the purpose of playing at any game for *money* or *other valuable things*," etc. The court say in conclusion: "It is not required that in records of this character their should be that technical precision required in records of conviction, in prosecutions originating in the circuit court; still there should be enough to show with reasonable certainty that that, of which the party is convicted, is an offense under the law, and one of which a justice of the peace has jurisdiction." Reversed and remanded.—*Truitt v. People.*

TRESPASS—JUSTIFICATION — REPLEVY OF HOUSE BY OFFICER.—This was an action of trespass *quare clausum fregit*, brought by plaintiff against defendants, the declaration charging that the defendants forcibly and unlawfully entered upon plaintiff's close and removed therefrom his dwelling-house, the same being attached to the freehold, and being real estate. The defendants plead in substance that, acting as sheriffs and deputy-sheriffs, they seized the said dwelling-house under a writ of replevin against plaintiff, which reciting the wrongful detention of the following goods and chattels, to wit: one-story frame dwelling-house," commanded them to "replevy and deliver the said goods and chattels to the plaintiff." The question presented upon the pleadings is whether the writ of replevin is a sufficient justification for the sheriff. The court, through SHELDON, J., say: "The sheriff but obeyed his writ, and did the very thing he was commanded to do. The law in such cases protects the officer. In 7 Mete. 257, Shaw, C. J., says: 'As a general rule, the officer is bound only to see that the process which he is called on to execute is in due and regular form and issued from a court having jurisdiction of the subject. In such case he is justified in obeying his precept.' It is asserted that there was here an attempt to replevy what was a parcel of the real estate of the appellant; that real estate is not the subject of replevin. The question is not what was the actual fact, but what was the officer justified in regarding as the fact. Although it ordinarily is attached to and forms a part of the realty, there may be circumstances existing in which it will be a personal chattel. Surely it was not for the sheriff to set up against this the ordinary presumption that the house was part of the realty and refuse to obey the writ. It did not belong to him to institute an inquiry whether or not the house was the personal property of the plaintiff. But he might act upon the writ itself as his sufficient authority, and if the defendant should thereby be wrongfully injured, his resort for redress should be to him who sued out the writ and not to the ministerial officer who obeyed the mandate of the writ." Affirmed. — *Sample v. Broadwell.*

DEBT—BOND TO CONVEY REAL ESTATE— EFFECT OF POSSESSION BY PLAINTIFF.—This was an action of debt brought by plaintiff against defendants, heirs at law of one M, on a penal bond conditioned, if the defendants should make to the plaintiff a good and sufficient deed of convevance in fee simple, free from incumbrance, within sixty days from the 15th day of March, 1871, to certain real real estate—then the obligation was to be void. The breach alleged was that the defendants did not, nor would they deliver a good and sufficient deed of the premises within sixty days from the 15th day of March, nor at any time afterwards, but wholly neglected to do so. The defendants put in two pleas, alleging, in substance, that, after making the writing obligatory, and before the commencement of the suit, the plaintiff, under this agreement, entered into and took possession of the premises therein described, and remained in the occupancy of the same up to and long after the commencement of this suit, and that defendants executed a deed to said premises, and that on the 17th day of ——, while plaintiff was in possession of the premises, offered to deliver the same to the plaintiffs, etc. To these pleas there was a demurrer, which was overruled, and plaintiff appeals. Plaintiff contends that the pleas are defective, because they aver a tender of the deed after the sixty days, but adroitly avoid the breach assigned by plaintiff, by averring that while the plaintiff was in possession they tendered a deed. BREESE, J., who delivered the opinion of the court, says: "We think a full answer to the objections urged by plaintiff in error is, that the pleadings show that, at the time of the commencement of the suit, the plaintiff was in the actual and undisputed occupancy of the premises. While so in possession no authority was cited to show that she could maintain an action for the penalty of the bond. Plaintiff should, before suit brought, have restored the possession. It would not be just that she should retain the estate and recover back the purchase-money." Affirmed.—*Long v. Sanders.*

[Filed at Ottawa, June. 21, 1878.]

PARTNERSHIP—DISSOLUTION — NOTICE.— Opinion by DICKEY, J.: "Appellant and his brother, Frederick, in 1868, formed a partnership and carried on a business which required the purchase of certain classes of lumber. They carried on this business until some time in 1869, say about eighteen months, and then appellant withdrew from the firm. There is no proof that appellant had any dealing of any kind with the firm while it existed. Some time in 1870 appellees began to sell lumber to Frederick, and from time to time to receive payments, and so continued to do some two or three years; and when that business was closed a balance was due appellants, and for that balance this suit was brought against both of the brothers, charging them as partners. Service was had upon appellant alone. He put in issue properly his liability as a partner. On the trial no proof was given tending to show either that plaintiffs had dealt with the firm while it was in existence, or that appellant had afterwards held himself out to plaintiffs, or to the world, as a partner, either affirmatively or by an acquiescence in known acts of his brother tending to that conclusion. It was insisted by appellees that Frederick had, in one mode and another, represented that appellant was his partner, and that on the faith of such representations appellees had given him credit. The court charged the jury that appellant, as an outgoing partner, was chargeable for subsequent debts, unless he had given public notice of the dissolution, or notice thereof had actually come to appellees before they gave the credit. The duty of a retiring partner to give notice of the disso-

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lution of the partnership is a duty which he owes to those only who had before that dealt with the firm. To strangers he owed no such duty. As to them he could only be charged as a partner (when, in fact, he was not), by showing that he in some manner continued to hold himself out to the world as such, or did so hold himself out to the parties relying upon that idea. This, of course, he might do in divers ways. If he knowingly suffered his name to be used in the firm name, or to continue on a sign, or to be used in bill-heads, or by permitting representations made to that effect, with his knowledge, to go uncontradicted. The proofs in this case do not show any fault of appellant in this regard. The ruling of the law on this question by the circuit court was erroneous, and for this error the judgment must be reversed and the cause remanded for a new trial. Reversed and remanded."—*Nussbaumer v. Becker.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1878.

HON. WILLIAM E. NIBLACK, Chief Justice.
" HORACE P. BIDDLE, }
" JAMES L. WORDEN, }
" GEORGE V. HOWK, } Associate Justices.
" SAMUEL E. PERKINS, }

EVICTION—PROMISSORY NOTE — EXTENT OF ASSIGNOR'S LIABILITY.—1. An eviction is a turning out of possession, or placing a party in such a situation that his expulsion being inevitable, he voluntarily surrenders the possession in order to avoid expulsion. 2. The contract of the assignor of notes negotiable by statute, but not by the law-merchant, is a warranty that the maker is liable on the note and able to pay it. The liability of the assignor to the assignee, in such case, can not exceed the amount paid by the assignee on such contract, with interest from the time of payment. Opinion by HOWK, J.—*Black v. Duncan.*

JUDGMENT-LIENS— NATURE AND EXTENT OF.—A judgment is not a specific lien on any particular real estate of the judgment-debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable. A judgment-creditor has no *jus in re*, but a mere power to make his general lien effectual by an execution and levy. A judgment-lien on land constitutes no property or right in the land itself; it only confers a right to levy on the land to the exclusion of other adverse interests acquired subsequent to the judgment, and when a levy is actually made the title of the creditor for this purpose relates back to the date of the judgment, so as to cut out intermediate incumbrances. The attaching of the lien upon the legal title forms no impediment to the assertion of all equities previously existing over the property. The lien creates a preference over subsequent acquired rights, but does not in equity attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person. 57 Ind. 393. Opinion by NIBLACK, C. J.—*Wharton v. Wilson, Admr.*

RESULTING TRUST—MONEY DEPOSITED IN BANK.—A loaned B money, taking a mortgage on real estate to secure its payment. Afterwards B, wishing to borrow more money on the real estate, procured A to release his mortgage, agreeing that the money so borrowed should be held for A's use, and immediately applied to the payment of his debt. A released his mortgage and B secured from C more than enough money to pay A's claim, and deposited money in bank in his own name. Before B had settled with A, B died insolvent, and the bank appropriated the money otherwise than to pay A's claim. Where a person, as an agent, has money of another in his hands and deposits it in a bank in his own name, the beneficial owner may recover the money or its value from the bank, where no rights of innocent persons have intervened. 57 Penn. St. 202. But on the facts stated, *held*, the title to the money did not vest in A so as to convert B into a trustee for him, nor had a trust attached to any definite part of the money which A could enforce against the bank. If the bank had had notice of all the facts, perhaps a case of specific performance of the contract to apply a portion of the money deposited by B to the payment of A's claim might have been made. Story's Eq. Juris. 759, *et seq.* Opinion by PERKINS, J.—*Tullis v. First Nat. Bank of Attica.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1878.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, }
" D. J. BREWER, } Associate Justices.

PRO TEM. JUDGE —DEPOSITION— LANDLORD AND TENANT—POSSESSION UNDER PURCHASE.—1. Where the proceedings of the court below are sought to be reviewed by a case made, and the case made recites that the trial and proceedings were had before a judge *pro tem.*: *Held*, that the judge *pro tem.* is the proper person to sign and settle the case made, and *held*, that to make such signature proper as a part of the authentication of the case made, it is not necessary to set forth in the record the mode or reasons of the selection of the *pro tem.* judge, nor his qualification to the office. 2. A deposition to be read on the trial of a case in the district court must be filed *at least* one day before the day of trial; and the statute means thereby, that one *clear* day must intervene between the filing of the deposition and the commencement of the trial at which it is to be read; to properly compute the time within said statute, *both* the day on which the deposition is filed and the day of the trial are to be excluded. 3. Where possession is taken by a defendant of certain premises, for which rent is sued for, under an agreement with the plaintiff to exchange lands free from all encumbrances, and where each gives the other possession of his real estate, and the possession is continued by the defendant *solely* on the representations and promises of the plaintiff to consummate the trade by executing a deed and clearing off a mortgage-lien on the property occupied by the defendant, and the bargain fails of consummation by the refusal of the plaintiff to free his lands from the mortgage-lien and make the deed, and defendant is evicted under proceedings to foreclose the mortgage: *Held*, that the plaintiff can not recover in an action for rent for such occupation of the premises by defendant, as he can not, without the consent of the defendant, under such circumstances, convert him into a tenant, so as to charge him with rent. Opinion by HORTON, C. J.—Reversed. All the justices concurring.—*Garvin v. Jenerson.*

INFORMATION — CHANGE OF VENUE — CONTINUANCE—EVIDENCE — JURY— INSTRUCTIONS — BURGLARY. — Where the clerk fails to attach his signature and seal to the jurat of an affidavit verifying an information, and the defendant pleads not guilty to the information while so defective, it is not error for the court to permit the clerk, before a jury is called, to perfect the jurat by attaching his signature and seal, and this notwithstanding the only evidence that the

county attorney in fact swore to the affidavit subscribed by him before the filing of the information is the oral statement of the clerk not under oath that such was the fact. 2. A change of venue in a criminal case, on account of the bias or prejudice of the inhabitants of the county against the defendant, can only be had when the existence of such bias or prejudice is shown to the satisfaction of the court. And where a large number of affidavits and counter affidavits are offered, in which opinions are expressed in general language pro and con upon the question, the means of knowing the general sentiment of the community, as disclosed by the several affiants, is an important factor in determining the value of their testimony. And, *held*, that the affidavits in this case do not disclose such bias or prejudice as entitled the defendant to a change of venue. 3. The cases of State v. Thompson, 5 Kas. 159, and State v. Dickson, 6 Kas. 209, are still authority on questions of continuance in criminal cases, for though the rule of the supreme court upon which they were based has been repealed, in lieu thereof there is an enactment of the legislature of the same import. 4. While evidence of the commission of one crime is incompetent on the trial of a party for another and distinct offense, merely for the purpose of inducing the jury to believe that defendant is guilty of the latter, because he committed the former, yet evidence which tends directly to show the defendant guilty of the crime charged is not rendered incompetent because it also tends to prove him guilty of another and entirely different offense. And generally where there is evidence of a conspiracy to commit a crime and of its subsequent commission, the state may, in support and corroboration thereof, show any act or conduct of the alleged conspirators intermediate the conspiracy and the crime, which apparently recognizes the existence of the conspiracy, reasonably indicates preparation to commit the crime or preserve its fruits, and that notwithstanding such special act of preparation was not the one discussed or agreed upon by the conspirators and is rendered actually fruitless and unavailing by the unexpected interferference of third parties, and also involves the commission of another and distinct crime. 5. During the trial the jury were sent, under charge of an officer, to view the place where the crime was committed. Neither the judge, the clerk, the attorneys, nor the defendant accompanied them. The record does not show that defendant applied for leave to accompany them, or made any objection to their going, or presented this action of the court as ground for a new trial: *Held*, no ground for reversing the judgment of conviction, notwithstanding section 10 of the bill of rights provides that "in all prosecutions the accused shall be allowed to appear and defend in person or by counsel, * * * * to meet the witnesses face to face," and section 207 of the code of criminal procedure that "no person indicted or informed against for a felony can be tried unless he be personally present during the trial." 6. While the jury were in their room considering their verdict, one of their number being wanted as a witness was brought by the sheriff, under direction of the court, into the court room, sworn and examined as a witness, and then returned to his fellows in their room. *Held*, no error. 7. Where the court expressly charged the jury that they must be "satisfied of his (defendant's) guilt beyond a reasona ble doubt," the jury could not have been misled or the defendant prejudiced by a statement elsewhere in the charge that the presumption of innocence "will protect the defendant, unless the state has overcome it by such proof as satisfies the jury of his guilt." 8. Where the court, in reference to the testimony of an accomplice, advised the jury that it was unsafe to give it entire effect, "unless he is so far corroborated as that the corroborating testimony shall render his statements credible," and that the corroboration "need not be as to everything to which he has testified, but if he be so far corroborated that the jury are convinced that he has told the truth," and also gives fully and clearly the reasons which render it unsafe to rely on such testimony: *Held*, no error, although it was not said in express terms that the corroboration should be as to some material fact. 9. Though there be three degrees of burglary named in the statute, yet where the facts stated in the information constitute only the crime of burglary in the second degree, and the defendant could not be convicted of any other degree of burglary under it: *Held*, that a verdict finding the defendant guilty as charged, and not specifying in terms the degree of burglary, is sufficient, and judgment can legally be pronounced upon it. Opinion by BREWER, J. Affirmed. All the justices concurring.—*State v. Adams.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

April Term, 1878.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY,
} Associate Justices.

DAMAGES—NEITHER EMPLOYEE NOR LEGAL REPRESENTATIVE CAN RECOVER FOR INJURIES UNDER SECOND SECTION OF DAMAGE ACT—EMPLOYER MUST KNOW, OR IN THE EXERCISE OF ORDINARY CARE, COULD DISCOVER DEFECT IN MACHINERY, TO ENTITLE INJURED EMPLOYEE TO RECOVER UNDER 3D SECTION OF ACT.—Plaintiff had judgment for $5,000, under instruction of court, against defendant railway company for damages for death of her father, Elliott, who was an employee of defendant, and was killed in consequence of the use of defective machinery by company, on a train of cars of which Elliott was a brakeman. Suit was brought under section 2 of Damage Act, c. 43 (1 Wag. Stat., p. 519). *Held:* (1) That the action could not be maintained under said section. The majority of the court (Henry, J., dissenting), adhere to the decision of this court, in Proctor v. R. R. Co., 64 Mo. 112, 4 Cent. L. J. 299. Plaintiff's right to recover is derived from the 3d section of said act, and in an action by one authorized to sue by that section, the jury may allow less than $5,000. (2) The suit can only be maintained by legal representative, when the deceased, if he had lived, could have recovered damages for his injury; and the same evidence as to the cause of injury is required in a suit by such representative that would have been required if he had survived and sued for the injury. Hence, an instruction predicating right of plaintiff to recover upon proof that defendant failed to provide sound and suitable machinery, if Elliott was not negligent, and was ignorant of the defect in the machinery, without the additional element that defendant was aware of the defect, or by the exercise of reasonable care could have discovered it, is erroneous. In the analogous case of an injury received by one through the incompetency of a fellow-servant, it is well settled by the English decisions that the employment of incompetent agents must be traced to the want of ordinary care on the part of principal. McDermott v. Pac. R. R. Co., 30 Mo. 116; Beaulien v. Portland Co., 48 Me. 291. And in cases of suits by employees for injuries received by the former, in consequence of defective machinery, the right of plaintiff to recover has been held to depend upon proof that the employer

knew of the defect, or by the exercise of reasonable care could have ascertained it. McMillan v. Saratoga & W. R. R. Co., 20 Barb. 449; Kergen v. West. R. R. Corpn. 4 Seld. 175; M. R. & L. E. R. R. Co. v. Barber, 5 Ohio St. 541; Shearman & Redf. Neg., § 99. Reversed and remanded. Opinion by HENRY, J.—*Elliott v. St. L. & I. M. R. R. Co.*

EVIDENCE—REGISTER'S CERTIFICATE OF ENTRY IN U. S. LAND OFFICE TO SHOW TITLE.—Plaintiff sued in ejectment for land in Polk County, and had judgment. Error alleged was admission in evidence of county plat of Polk County, to establish who entered the land from United States. The evidence was objected to for two reasons only: 1st. "That it was not properly certified." 2d. "That it had been changed since certified." The certificate was in these words: "United States Land Office, Springfield Mo., August 10, 1868. I certify that the within plat is a correct *abstract* of the records of this office. John S. Waddill, Register." Sec. 11, p. 561, 1st Wag. Ssat., provides: "Copies of any entry, or entries, or memoranda made on the books of the office of any register or receiver of any United States land office, certified to by said register or receiver to be correct, shall be received in evidence on the trial of any cause in any of the courts of this state." *Held*, 1. That it is evident the register used the word "abstract" in his certificate above, in the sense of "copy," as required by the statute, and that while the certificate might have been more formal, yet it is not to be regarded as insufficient. McClure v. McClurg, 53 Mo. 173. The manner in which the certificate s signed sufficiently shows that Waddill was register and signed the certificate in that capacity. No objection being made on trial, that no evidence was offered to show that Waddill was register at the time he made the certificate, none will be heard here. 3. The addition to the plat of *other* entries *after* the entry of the premises in controversy having been properly made, and certified, could, by no possibility, affect the validity of such entry. Affirmed. Opinion by SHERWOOD, C. J —*Wilhite v. Barr.*

BOOK NOTICES.

LAW OF MARRIED WOMEN IN PENNSYLVANIA. With a view of the Law of Trusts in that State. By CLEMENT M. HUSBANDS, of the Philadelphia Bar. Philadelphia: T. & J. W. Johnson. 1878.

The law of married women is in a very unsatisfactory state. Before the passage of the enabling statutes of late years, it was constantly presenting new and difficult questions, and the legislation of to-day has increased rather than lessened these difficulties. For this reason, the book before us will be very useful. The author's style is clear and pointed; and after a perusal of this book the reader will have a better idea of the rights, power and liabilities of married women as altered by statute, than he can readily obtain from other sources. What we have said here applies principally to the Pennsylvania lawyer, though the decisions cited and discussed by the author are not confined to that state. The view of the law of trusts, which covers about 100 pages, may be read with profit anywhere. The work deserves the favorable notice of the profession. The title, "Husbands on Married Women," may appear novel to others besides that correspondent of ours, who wrote to inquire whether the announcement of the book was a joke or not. It contains nearly 400 pages, and is excellently printed and well bound.

QUERIES AND ANSWERS.

QUERIES.

49. WILL—DEVISE—CONSTRUCTION.—In Pennsylvania, land was devised by A in this manner: "I give and devise to B and C, and to their heirs and assigns forever" (describing the real estate), "to have and to hold the same in trust to permit my wife to occupy and enjoy the same, and receive the rents and profits thereof so long so she may remain my widow. But should my wife marry again, her interest and claim in the said real estate shall cease and determine, and it shall remain in trust for the use of my child and grandchildren, during their joint lives and the life of the survivor of them; and at the decease of such survivor the same shall be sold, and the proceeds of the sale divided amongst the legal representatives of my said child and grandchildren." The will was executed in 1840. The widow never married. Two grandchildren were alive at the time of the execution of the will and death of the testator—children of the testator's son, who was dead. The testator's child, a daughter, after her father's death married and had one child. No further provision was made concerning the real estate. Would the child inherit directly from the widow? By the widow not marrying, did the child and grandchildren inherit the estate discharged of the trust? Does the child of the daughter at its birth become a joint owner with its mother and the other grandchildren, the widow having died after it was born? If the child of the daughter has a joint interest in the estate, and it should be the survivor of the two grandchildren and its mother, who will be the legal representatives referred to in the will? W.

ANSWERS.

No. 41.
(7 Cent. L. J. 39.)

The answer to this query in the JOURNAL of July 19th, is unsatisfactory. We question the soundness of the decision in West v. Rice, 4 Kas. 569. In that case the court say: "In making this application, the defendants offered *proof* fully complying with the provisions of § 62, p. 627, Comp. L. 62." This section is identical with section 81, quoted in question 41, but the syllabus shows that the defendants did *not* fully comply with that section. The mere statement under oath by defendant "that he can not, for the want of material testimony, which he has been unable and expects to procure," is not *proof*. If the defendant should merely state under oath, "I have a meritorious defense to the action," would any court deem that *proof* that he has a meritorious defense? Wills, in his work on Circumstantial Evidence (Marg. p. 2), says, "proof is that quantity of appropriate evidence which produces assurance and certainty." There is no proof at all in such an affidavit as that quoted in the syllabus of West v. Rice. If the justice has no discretion in such a case, he is simply bound to act on the judgment of the defendant, and not on his own judgment.

S. M. B.

NOTES.

CHIEF JUSTICE ROBERTS, of Texas, has been nominated for Governor of that state——The Judges of the Supreme Court of Michigan have decided that, in cases where the court may be equally divided, they will deliver no opinions, but simply affirm the judgment under the statute. The step has been taken in order to prevent, as far as possible, the evil effects which arise

from the unnecessary parade of differences of opinion in the court of last resort. Another advantage will be to keep down, to this extent, the number of reports.—— The Attorney-General of Illinois has given an opinion that, under the constitution of that state, a notary public has no power to commit a witness for contempt in not obeying a subpœna.——The Association for the Reform and Codification of the Law of Nations, will open the sixth annual conference at Frankfort-on-the-Maine, on the 20th inst. The Lord Chief Baron of England, president of the association, is expected to preside—An English Barrister, Mr. C. J. Tarring, has been appointed Professor of English Law, including International Law and Jurisprudence, in the University of Tokio, Japan. He will lecture in English, that having been adopted as the learned language at the University of Tokio——The acquisition of Cyprus will, it is said, open up a new and lucrative field for English lawyers. The crown advocate of Malta, Sir Adrian Dingle, L. L. D., has been appointed to assist General Wolseley in organizing the government of the island——At the Winchester assizes, in England, a few weeks ago, a widow of seventy years obtained £10 damages and costs against a widower of seventy-one, for breach of promise of marriage. The plaintiff appeared in the witness box in widow's weeds and a false front. The former were for her late husband, who died a year before the engagement to the defendant, and the latter, she said, was rendered necessary by her hair having all fallen off in consequence of the defendant's heartless conduct——A Frenchman named Courtade has found a new way to pay back rent. He had been sued for arrears, and threatened with expulsion. He insisted that the judge, the clerk, the bailiff and the landlord should examine the premises. These four men, with the landlord's wife, entered the yard together, and the tenant told them he was willing to pay up, only he wanted an extra grange and the well. He said: "I'll go and fetch the agreement," and went into the house. He brought back two guns and a pistol. "Now," he said, "we are on the battle-field; we must all die here; these are for you—this for me." And he pointed to the arms in his hands. "Come, come," said the judge, kindly, "this is childishness. Put down those arms." Courtade fired, and the judge and the landlord fell dead where they had stood. The clerk and the bailiff followed next. The landlord's wife ran into the house and locked the door. Courtade followed her and fired through the window. She had a child in her arms. Both fell. He then walked quietly to his own place and shut himself up. The house was soon surrounded. He tried to kill himself, but did not succeed. The four men in the yard were dead. The woman, thanks to her presence of mind, escaped. Courtrade tried to appear mad, but did not deceive the doctors. He is terribly afraid of dying now. He hopes to have the sentence of death commuted to hard labor for life.

We have received from "W & B" a lengthy defense of the position assumed by them in the Query department of this Journal, Vol. 7, p. 39, and which was attacked by another correspondent on page 100 of the same volume. "Our statement was," they say, "that the constitution of a state from the moment it is superseded by a new one, ceases to have any vital force, the new one from that time alone possessing such essence. Of course we intended the operation with reference to the future. We adhere to that opinion. The State v. Barbee, 3 Ind. 258, does not militate against our proposition, but is an authority in its favor. The only points resolved by that case were, 1st, that the section of the new constitution relied upon to nullify the act under which Barbee was indicted, did not refer to such acts, having reference only to *future* and no *past* enactments of the legislature, and 2d, that the act under which Barbee was indicted, was *expressly continued in force by the new constitution.* The only cases in 4 Ind. that can have any bearing upon the question are Jones v. Cavins and Maize v. State, and neither of them directly or indirectly throw any light upon it and are not germane to it. Blackstone claims omnipotence for the British Parliament. But with us the doctrine never had a recognized existence. The American principle is that all sovereign power resides with and emanates from the people. In strictness there is no organized government with us that is sovereign. This is equally true of both state and National governments. The Federal Constitution expressly provides: 'The powers not delegated to the United States by the constitution nor prohibited by it to the states are reserved to the states respectively or to the people.' So it is with the constitutions of the different states. Limitation is imposed upon the exercise of power by the several governments created by them, leaving the residuary mass with the people in their unorganized sovereign capacity. No constitution ever transferred to the government created by it, all the power of the people. If it did, such government would be sovereign, and its will and discretion would be the measure of its powers. The people, however, possessing absolute sovereignty in the majesty of their might, can legally obliterate every existing municipal regulation, and in their stead enact new and different ones, restrained only by common right and reason. But all our governments are strictly only agents of the sovereign power, and their constitutions "merely the letter of agency." The judiciary has been specially commissioned to restrict their operations within the limit of the delegated powers, and it is the duty of the courts to do so in all proper cases. And this duty has been fearlessly performed both by the Supreme Court of the United States and the supreme courts of the several states. The courts in adjudicating upon constitutional questions are governed by the same rules as in adjudicating upon the statutes. It is settled by a line of authorities that a statute of a prior legislature is repealed by implication by the statute of a subsequent legislature when they conflict. Spencer v. State, 5 Ind, 46, and cases cited. The same rules applies to a statute passed at the same session the latter controlling in case of conflict. Ham v. State, 7 Blkf., 314; Spencer v. State, 5 Ind. 48, and cases cited. The same rule has been adopted in adjudicating upon constitutional questions. Quick v. Whitewater Township, 7 Ind. 578. It will not be doubted that a statute repealed by a subsequent statute is completely eliminated, and has no longer force at law. By a parity of reasoning, a constitution that has been repealed ceases at once to have any further vital power. It may be necessary to refer to the defunct constitution to determine questions that arise. But in all such cases reliance can not be had upon any vital power to exercise after it was abrogated. For instance: If the Legislature of Indiana, while the Constitution of 1816 was in force, had enacted a law not competent for it to do under that instrument, such law will be held unconstitutional and void, whenever any question may arise upon it, not however because the living power of the constitution continued to operate after it was superseded. We think we may safely claim that the courts have uniformly held, and the same may be regarded as legal maxims, the following: 1. The constitution of a state is the fundamental and permanent law of such state. 2. Nothing contravening the constitution of a state can have the force of law within such state. 3. The constitution of a state from its very nature in the exercise and operation of the sovereign powers possessed by it is both exclusive and singular."